

A
VINDICATION
OF THE
EXCLUSIVE RIGHT
OF
AUTHORS
TO
THEIR OWN WORKS:

A SUBJECT NOW UNDER CONSIDERATION
BEFORE THE
TWELVE JUDGES of ENGLAND,

L O N D O N:
Printed for R. GRIFFITHS, in the Strand.
M D C C L X I I.

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TWELVE JUDGES OF ENGLAND



L. O. N. 1817.
Printed by R. Gutteridge in the Strand.
MCCCLXVII.

A

VINDICATION, &c.

IT will, perhaps, be matter of surprize to those who are not accustomed to the use of artificial reason, that a question should be made—Whether, at common law, an author hath a perpetual and exclusive right to sell his own works?

This question nevertheless, simple as it seemeth, hath exercised the talents of some of our ablest advocates; and hath been found of such difficulty and importance, as to be referred to the consideration of the twelve judges; before whom, after repeated arguments, the subject still lieth open for farther discussion: A circumstance which reflects honour on the judicature of this country, where matters of private property are not hastily or capriciously determined, but thus undergo

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the most patient, solemn and impartial examination.

Were wishes to prevail in an adjudication of this nature, one would incline to wish, that an author's right to the works of his own mind, the most noble operation of which human nature is capable, should be under the protection of the state, and rendered as secure and extensive as any mode of property whatever. At the same time, it must be confessed, that there are many circumstances which place the case of authors in an unfavourable light; when we consider the shameful and licentious use of the press, which daily teems with rank obscenity and virulent defamation; we are almost induced to desire that a right thus grossly abused, should be confined within the closest restrictions.

A dispassionate mind, however, will distinguish between the case of such licentious writers and the cause of authors in general. Let us leave them who are guilty of such flagrant abuses, to the punishments which the law hath provided: but let not their example, influence our judgment to the
pre-

prejudice of those, and we can boast of many among us, who do honour to their country and to their species.

Divesting ourselves therefore of favour on the one hand, and of prejudice on the other, let us examine on which side the merits of this question seem to incline ; for it might justly be deemed vain and presumptuous, to conclude positively with respect to a subject, on which personages of such eminent abilities still find reason to suspend their judgment.

In order to attain a just idea of the right under consideration, it may be necessary to examine the nature and extent of property in general on the grounds of natural reason, as also on the principles of law : and as the arguments in the following sheets are addressed to men of literature in general, the writer will endeavour, as far as possible, to avoid all technical language and juridical subtleties.

It is admitted, that in the first rude state of nature, all men had equal right to the use of vacant subjects which lay in common ; and such communion, for some time, supplied the place of property. But this com-

mon right continuing no longer than while the occupant was in actual possession, inconveniencies arose which made way for the establishment of *property*: by which is understood, a perpetual exclusive right in the possessor, to retain certain subjects till he hath signified his intention to abandon them.

Such a right being settled, it became in its nature *transmissible*; for he who hath a perpetual exclusive dominion over any subject, may either alienate it in his life-time, or transfer it at his death*: and that either absolutely, or under such limitations as he shall think proper to impose.

The subjects over which property may be exercised, are, in their general division, either the productions of nature, or the inventions of art; or they partake of both. If men may claim an absolute and exclusive right over the things of nature, *a fortiori*, they may claim such a right over subjects of their own creating or improving.

* This is admitted by all the writers on the law of nature: even they who doubt whether the power of making a will proceeds from the law of nature or from positive institution, do nevertheless allow of donations *Mortis Causa*,

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The writers on the law of nature, require three qualities to constitute an object of property; 1st, That the subject by itself, or by its connexion with other things, be capable of affording some benefit to mankind, either immediately or mediately. 2dly, That it be open to the acquisition of mankind, and reducible under the custody of man. 3dly, That the possessor have the power of excluding others from sharing the benefit with him.

Now a literary copy partaketh of all these qualities.—It is capable of being useful to mankind—It may be kept under safe custody—And the owner may exclude others from participation.

But he who inventeth or improveth any subject, hath not only a property in the individual thing invented or improved, but he may multiply the subject by framing others after the same model, and his right of property is the same over all.

The faculties of human nature, however, being perhaps nearly equal, therefore he who brings any invention or improvement into
society,

society, cannot set bounds to the ingenuity of others, or preclude them from the power of imitation. They may, according to their degree of skill, model other materials, without his leave, into the like form; and thereby gain an exclusive right in that individual subject of imitation, which they likewise, in their turn, may multiply.

Having deduced this imperfect sketch of the state of property from the principles of natural reason, it remains to consider how far the law hath thought proper to abridge or extend these natural rights.

It will be foreign to the present design, to enter into the various modifications of property which the law hath created over the things of nature. For the present purpose, it will be sufficient to examine what regulations it hath established with respect to subjects of invention or improvement, which alone apply to the question under consideration.

These subjects are very various in their nature. Some argue great skill in the design, and are extremely facile in the execution.

cution. In others, there is little merit in the design, but great labour in the execution. Some wholly serve the end of public utility; others are chiefly matters of ornament and amusement. In few words, in some the labour of the hand prevails, in others the work of the mind: for some idea is requisite in the construction of the most simple subject of invention.

Hence we may readily perceive a fertile source of inconvenience. One who by great ingenuity and application of mind had given existence to a subject, was liable to be deprived of the fruits of his discovery by an imitator, whose chief merit perhaps was manual.

To remedy this hardship, and to secure the original inventor in the exclusive enjoyment of the profits arising from his own discovery, the interposition of the state was necessary. But as the best institutions are liable to abuse, so the remedy which was appropriated to guard the right of inventors, was perverted to protect an unjust claim in those who could not plead the merit of invention.

Many

Many such, by false or partial representations, or perhaps by corrupting the ministers of government, obtained exclusive privileges, which gave birth to monopolies : A monopoly* being a grant for the sole making or selling, &c. of any thing, whereby *others are restrained of a freedom they had before, or hindered in their lawful trade* : for of a new invention, there can be no monopoly.

Yet, even in regard to new inventions, where the powers of the mind and body conspire to produce some mechanical subject, the exclusive right of the inventor ought to be limited to a certain time, in which he may be presumed to have reaped the just fruits of his discovery, and to have made a provision for his family. The invention then should be thrown open for the benefit of those who have the art to imitate the thing invented : every machine being an object of trade, which, according to the policy of all states, should be as free from restrictions as possible.

These leading observations being premised, let us next consider the nature of a literary copy, and examine whether it may not be

* 3d Inst. 181.

essentially distinguished from a machine : for if we can establish a real difference between them, we shall demolish the strongest hold, wherein the opponents of literary property have entrenched themselves.

A literary copy or book may be considered, 1. As an ideal or doctrinal composition.
2. As a manual or mechanical composition*.

With regard to the first, it is not necessary that the ideas be original. It is sufficient, that by a new combination of known ideas, the author has produced a different composition, or established a different doctrine. Nay, a mere compilation, in which there may not be a single idea of the compiler's, is sufficient to vest an exclusive right in a copy ; as in a report book, for example. Farther, being the author of the language only, is a good ground for maintaining an exclusive right in a copy, though the ideas belong to another. Thus a translator may claim such a right, being, in respect to those who are not skilled in the original, the parent of a new doctrine.

* These two general divisions are sufficient for the purpose of the present argument : though each might be branched out into several subdivisions.

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With

With respect to the mechanical composition, it is not requisite to perfect an author's right to his copy, that the writing should be of his own hand; for he who employs an emanuensis, has as compleat a right to the copy as if he had penned it himself: the emanuensis having, or being supposed to have, a consideration for his manual labour. The same may be said of printing. The printer is *Quasi*, and in lieu of, an emanuensis, being paid by the author for his art and mechanical operation.

From hence, perhaps, we may be able to collect some essential distinctions between a book and a machine or utensil. In the latter, the completion of the piece of *mechanism* is the *end* to which the ideas of the inventor are directed. In the former, there are two sets of ideas, tending to different ends. One set is applied to the framing of the *doctrinal* composition, which is the end the author proposes; the other is directed towards the executing of the *mechanical* composition, which is the end * the printer

* This distinction will be illustrated by the reasoning in the case of the earl of Yarmouth against Darrel, which will be cited hereafter.

has in view. Therefore in a book, the *mechanical* part, that is, the writing or printing, is, with respect to the author, only the *mean* for promulging the doctrinal part, which is the *end*.

Farther, a machine, as has been intimated, if exhibited to view, may be copied or imitated without the leave of the inventor; therefore, as has been shewn, it wants a distinguishing characteristick of property. But an author may produce his copy, may use it in public, and suffer it to be inspected, and yet no one without his consent can make themselves masters of the contents. Therefore if they propose to reap any benefit from the composition, they must entitle themselves to the expected advantage under such conditions as he thinks proper to impose, where he is not restrained by positive institution: and he hath certainly a perpetual exclusive dominion over that subject which he can use in public, and which nevertheless another cannot imitate against his will.

Again, a machine is in itself, as soon as it is compleated, an object of trade, and con-

sequently the property, as has been observed, ought to be limited. On the contrary, a literary copy is only an object of trade, *quatenus* its *mechanical* composition; that is, the printing, &c. Therefore if the question was, whether a printer should have a perpetual exclusive right of printing, the argument which places a book on the same footing with a machine, might perhaps apply with some force.

But an author's right to a literary composition, depends on different principles. It is a complete composition before it is printed, and before it comes to be an object of trade. The author may sell his original manuscript to one man absolutely for a gross sum: but if he cannot obtain an adequate sum at once, or if he rather chooses to depend on an uncertain compensation to be collected by gradual returns, he may then multiply his copies, and dispose of them to several, each for a small consideration, still reserving to himself the absolute propriety over the original manuscript. In which case, natural reason and justice determine that every copy which is multiplied, shall be multiplied for his benefit: and it seems the strangest doctrine

trine imaginable to contend that the art of printing, which has facilitated the circulation of literary copies, should restrain or prejudice the author's right.

The law will always adapt its institutions to the principles of natural reason, and guard the rights of an ingenious and industrious individual, unless the protection it affordeth should tend to work some public wrong, in which case artificial reason will step in and suggest some medium, to reconcile, as far as possible, such discordant interests.

But in the present instance, no public injury can ensue from an author's perpetual exclusive right over his own works. It has no tendency to prejudice the interest of trade, for so far as the mechanical part of literature is concerned, no exclusive right is set up or pretended.

Neither hath it any tendency to confine the powers of genius; for he who obtaineth my copy may appropriate my stock of ideas, and, by opposing my sentiments, may give birth to a new doctrine; or he may coincide with my notions, and, by employing
different

different illustrations, may place my doctrine in another point of view : and in either case he acquireth an exclusive title to his copy, without invading my property : for though he may be said to build on my foundation, yet he rears a different superstructure. An *inconsiderable* addition or improvement however, will not support his claim : the supplying literal or verbal omissions, or the correcting of literal or verbal errors, for instance, will not be sufficient to found a new right in him : and a jury endued with the slightest degree of common understanding may, be the subject what it will, distinguish, or be taught to distinguish, where the difference is essential, and where it is evasive.

Nevertheless it has been urged by a late shrewd and ingenious writer *, that an author's property is not *real* but *chimerical*. " Property," says he, " is either corporeal
 " or incorporeal. It is admitted that this
 " property consists principally in the ideas,
 " though it be likewise inherent in the form
 " and composition of the piece, by which it
 " is most easily distinguished and ascertained.

* See an ENQUIRY into the Nature and ORIGIN of Literary Property.

" There-

“ Therefore it is incorporeal, yet it totally
 “ differs from every other incorporeal right,
 “ either original or derivative.” He farther
 observes, “ that admitting this property, it
 “ shall be governed by the rules of other
 “ property. As if,” saith he, “ the chil-
 “ dren could inherit, or the wife be dower-
 “ able of an author’s lofty and sublime con-
 “ ceptions.” He then proceeds to give other
 instances where the author’s right to his copy
 cannot be governed by the rules of property
 which he exemplifies: and indeed his con-
 clusions would be as just as they are inge-
 nious, were the property under considera-
 tion of the nature which he supposeth.

It will not be necessary, however, to re-
 fute the arguments of this writer *seriatim*,
 since the principles themselves from whence
 they are deduced, appear to be altogether
 indefensible.

This property, saith he, is not *real*. This
 is true, in the technical sense of the word.
 But here lieth the error. He uses the
 word *real* ambiguously, not only as opposed
 to *chimerical*, but as contradistinguished from
personal property. Thus when he saith, the
 children

children cannot *inherit*, or the wife be *dow-able* of a literary copy, his conclusions are just, in the technical sense of those words. For an *inheritance*, and even a *freehold* cannot spring but out of lands, tenements, or hereditaments: or, as the old lawyers would phrase it, something which sounds in the realty. But though this property is not *inheritable*, it is *transmissible*; that is, it may be transferred by the proprietor in his life-time; it may be bequeathed by will; or it may be divided according to the directions of law, in case of intestacy.

Again, it is true, that a wife is not *dow-able* of this property, because *dower* must issue out of lands or tenements: but a wife will be intitled, under the statute of distribution, to her share or portion of the profits arising from the sale of this property.

This leads us to consider an author's right to his copy in another point of view, in which it will appear to have all the qualities of property, and to be easily governed by the known and established rules of law.

Let us suppose then a literary copy to be a personal thing, and it will be found to have every

every quality, by which the common law of England hath defined and described this species of property. For it may be acquired, 1. By the king's *prerogative*. 2. By *gift*. 3. By *sale*. 4. By *theft*. 5. By *testament*. 6. By *administration* *.

It may likewise be recovered in the same manner as any other personal property: for if any one wrongfully possesseth himself of an author's copy, he may sue what the law calls a mixed action against him; that is, an action to recover as well the thing demanded

* The division of property into corporeal and incorporeal makes no difficulty in this case. For though the sentiment or doctrine, considered abstractedly, is incorporeal and ideal, yet, being impressed in visible characters on the paper, the manuscript copy is a corporeal subject.

The argument drawn by the writer of the Enquiry from the proposition that "ideas are not susceptible of property," may be granted without admitting his conclusions. For though ideas considered abstractedly, are not susceptible of property, yet when impressed in visible permanent characters on paper, they then become as it were incorporated, and a literary copy is thereby made the property of the author. But, says the writer, when it is published, it becomes common. No—the author sufficiently intimates his intention to appropriate it to his own use, by publishing it for gain, at a certain price.

as damages against the wrong doer for the unjust detention : and we may challenge the opposers of literary property, to produce an instance where it cannot be governed by the established rules of law.

Having considered this right on the general principles of law, let us now proceed to the examination of those *particular cases*, wherein literary property has come under consideration ; and we shall find that the arguments of the most eminent lawyers, and the sense even of the legislature itself, are all in favour of the author's exclusive right.

It is true, that the precise question now under solemn deliberation before the twelve judges is of the first impression : therefore, where we cannot rest our arguments on a positive adjudication in point, we must be content to reason by analogy and inference : and the first case which occurs for this purpose is that of the Company of Stationers against Seymour*.

The Company, as Patentees, brought an action of debt against Seymour, for printing

* 1 Mod. 256.

Gadbury's Almanacks: and Pemberton, on behalf of the Company, observed that "there was once a question how far a grant for the sole printing of any particular book, should stand good against them who claim a *property in the copy*, paramount to the King's grant? And opinions, saith he, were divided upon the point. But he urged, that the defendant in this case made *no title to the copy*, but only pretended a nullity in the patent. The book, he concluded, which this defendant has printed, has no *certain author*: and then, according to the rule of law, *the King has the property*; and by consequence may grant his property to "the Company."

Here we find that the arguments at the Bar clearly and expressly acknowledge the author's right of property to his copy, which, in some cases, is paramount the King's grant: and we shall see that these arguments are farther corroborated by the opinion of the Court, who resolved, "that Almanacks may be accounted prerogative copies: and added, that since printing
D 2 " hath

“ hath been invented, and is become a com-
 “ mon trade, *so much of it as hath been kept*
 “ *inclosed, never was made* COMMON: but
 “ that matters of *state*, and things concern-
 “ ing the government, were never left to
 “ any man’s liberty to print that would:
 “ that *though printing be a new invention,*
 “ *yet the use and benefit of it is only for men*
 “ *to publish their works with more ease than*
 “ *they could before*—That men had some
 “ other way to publish their thoughts before
 “ printing came in; and forasmuch as print-
 “ ing has always been under the care of
 “ government, it may well be presumed that
 “ the former way was too—That there is *no*
 “ *particular author* of an Almanack: and
 “ then, by rule of law, the *King has the*
 “ *property in the copy*—That the additions
 “ which are common in Almanacks, do
 “ not alter the case, no more than if *one*
 “ *should claim a property in another man’s*
 “ *copy*, by reason of some inconsiderable ad-
 “ ditions of his own.”

From this opinion of the court, we may
 collect, that so much of printing, as *has*
been kept inclosed, that is, the subject of those
 copies

copies which the prerogative has appropriated, and which relate to matters of state, &c. never was made common; or in other words, never was open to be discussed and printed by every author who chose to publish his ideas on those subjects. This proposition we see is a negative pregnant: for the plain inference from hence is, that in such copies which do not concern the government or public constitution, the author might claim a right, paramount the prerogative.

This inference is supported by what follows: For we find that *one principle* on which the court determined the merits of this case, was that an Almanack had no *particular author*, therefore the King had a property in the copy. Consequently where there is a particular author, the prerogative cannot take place, much less can a right accrue to a subject.

Again, it was resolved by the court, that from an inconsiderable addition, no one should claim a property in *another man's copy*; which is a farther *express* acknowledgement of the author's *exclusive* right.

Moreover

Moreover it is material to observe, that the court on this occasion declared the use and benefit of printing to be that "men might publish their works with more ease than before." But should the opinion prevail that an author has no exclusive right in his copy, then printing, which was intended for his benefit, and contrived to circulate his works with *more ease*, will impose new hardships on him, and prove of the utmost prejudice to his interest.

But the next case which comes under consideration, applieth perhaps yet stronger to support the principles and distinctions above advanced in favour of the author's right.

It is the case of the Earl of Yarmouth, as Patentee, against Darrel *; in which it was contended, on the principles of the foregoing case, that "where no individual person can claim a property in a thing, there the King hath a right vested in him by law: And that where there is an *inherent prerogative in the King, when-*

* 3 Mod. 75.

“ever he exerts it, all other persons are bound
 “who were at liberty before.”—On this occasion likewise it was argued, that “the King
 “had as great a prerogative in writing any
 “thing of a public nature, as he hath in
 “printing of it: and that printing was as
 “an art *exclusive of the thing printed.*”

The court likewise, in this case, raised a distinction between “things of a *public*
 “use, and those things which are public in
 “*their nature.*”

From hence it may be collected, that if the thing printed be of a *public nature*, it becomes a prerogative copy: or if no individual person can claim a property, then likewise the prerogative takes place.

Where the thing printed is not of a *public nature*, that is, not relative to matters of state, though it be of *public use*, yet the author has an exclusive right to his copy.

But, says the writer above-mentioned, “The
 “knowledge, sentiment, and doctrine contained in a book, are composed of simple
 “ideas, and arise from our perception of
 “their

“ their agreement or disagreement. Per-
 “ ception is a power or quality of the
 “ mind: to possess this quality exclusively
 “ is to restrain all men from exercising their
 “ faculties on their own ideas.”

The ingenious writer is here combating with shadows presented by his own imagination. The exclusive right contended for, is so far from having a tendency to restrain others from the exercise of their faculties, that it contributes to enlarge them; as it affords encouragement for authors to compose works on which others may employ their intellectual talents, and thereby multiply their perceptions.

But justice forbids that they should *directly* convert that very subject to their own pecuniary advantage, which has given them an opportunity of exercising and extending their ideas. He who buyeth a book, payeth only for the individual book so bought, but doth not purchase a privilege of multiplying the copies. He pays but a small consideration for it, in proportion to the value of the original manuscript; for this reason, because there is an implied condition, annexed to

to the sale of each book, that every impression shall be for the benefit of the author, who is to gather his profits by slow returns.

The purchaser may indeed *indirectly* raise a pecuniary benefit from his purchase : since the agreement or disagreement he discovereth in the ideas which compose the book, may be the foundation of a new composition, in which he may either contravert, or farther illustrate the principles of the book so purchased.

This brings us to examine into the title to copies of *antient authors*. These, says the writer, are no more susceptible of property than the elements of air and water, which are for the common benefit of mankind : and, he adds, *all copies are of the same nature*. So that upon this principle, an author hath no property even in his individual manuscript ; any one, consequently, might, without any injury to this writer, have seized his copy in its passage from the *escrutoire* to the press. Moreover, if it is no more susceptible of property than the elements of air and water, then it could not become the subject of prerogative, which our author

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will

will not contend. Such are the extravagances which result when ingenuity attempts to writhe and torture arguments, in order to make them quadrate with erroneous principles!

To prove, however, that antient copies are not susceptible of property, he supposeth a manuscript of Menander to be rescued from the dust. *“ The editor of this copy
“ could not, saith he, derive to himself an
“ exclusive right by occupancy or improvement :
“ nor can the king grant to him the sole right
“ of printing it for a term of years, because
“ he is not the inventor, nor is it of a public
“ nature and importance, relating to the good
“ and benefit of the subject.”*

In support of this doctrine, he citeth the case of the *Earl of Yarmouth against Darrel*, above-mentioned. But if he had maturely considered that case, he would have found that the reasoning it contains, was by no means favourable to his general principles, or applicable to the particular purpose for which he hath cited it.

The proposition there laid down, "that
 " the king cannot grant a patent unless the
 " invention be new," doth not prove that the
 prerogative is barred with respect to antient
 copies. Though the king cannot grant an
 exclusive right in them, on the principle of
 their being new inventions, yet he may make
 such grant upon a different principle—which
 is, that of there being no individual, par-
 ticular, or certain author, who can make
 title to the copy, whereby the property vests
 in the king, who may grant it to another.

This prerogative with regard to antient
 copies hath been frequently exercised; Queen
 Elizabeth, amongst others, granted a patent
 for printing *Corderius*; and though book-
 sellers do often multiply new impressions
 without restraint, yet the inherent preroga-
 tive being in the king, whenever he exerts
 it, he excludeth all others, and their right is
 divested.

It remaineth now to enquire into the sense
 of the legislature concerning the right in
 question. The first statute on this subject is,
 the act of the 13th and 14th of Charles

the Second, for regulating of printing. Every one acquainted with the history of those times, knows the occasion and view of this act, which, notwithstanding its specious title, hath a direct tendency to impose the most heavy and servile shackles on literature. Happily it is expired; and we hope that an institution so repugnant to the principles of a free government, will never be revived.

Yet even this act, so injurious to literature, acknowledgeth and guardeth the exclusive right of authors to their copies. For it enacts,
" That no person shall print any copy which
" another hath by virtue of letters patent, or
" which shall be otherwise granted or assigned
" to him, WITHOUT LEAVE OF THE
" OWNER."

The next act which comes under consideration, is the 8th of Anne, entitled, " An
 " act for the encouragement of learning, by
 " vesting the copies of printed books in the
 " authors or purchasers of such copies, during the times therein mentioned."

The learned author of the *Letter to a Member of Parliament on the Subject of literary*

literary Property, has, with great acuteness, proved this to be not a *restrictive*, but an *accumulative* law; and consequently not the sole foundation, but an additional support of literary property. This he infers from the *preamble*, which sets forth the bad effects arising from the liberty taken of printing and reprinting books, without the consent of the authors or *proprietors*. "Now," saith he, "could the injured parties here mentioned be *proprietors* of that in which they had no property? Not only the *expression*, but the *sentiment*," he adds, "necessarily supposes the word *Proprietors* to be used in its strict and exact signification."

Did these arguments want a support, we might add, that if we could suppose the legislature to have used the word *proprietors* inaccurately, or, as denoting a possession without right; yet what follows would destroy such a supposition. For the first clause in the act provides, that "*the author of any*
 " *book, WHO HATH NOT TRANSFERRED*
 " *the copy to any other, or the bookseller who*
 " *hath PURCHASED OR ACQUIRED any copy,*
 " *shall have the sole right of printing for the*
 " *term of twenty-one years.*"

Here

Here it is manifest that the act does not *create* a right in the author or bookseller, but presumes a right already subsisting. It is observable, that the words above-cited, refer to transactions between the author and bookseller *prior to the act*.—Could an author *transfer* that in which he had not a legal exclusive property?—Could the bookseller *purchase* or *acquire* what the author had no right to *convey* or *transfer*.

Nothing can be more clear than the expression and sentiment of the legislature: having it in contemplation to grant an *additional* support for the encouragement of learning.—For this purpose it provides, that if the author hath *not* transferred his *right*, he shall be intitled to such additional support for a certain term; that is, he shall have the sole right (already subsisting) strengthened and secured by the penalties which follow. But if he *hath* transferred it, then the bookseller, who hath purchased it, shall be intitled for the like term to the same additional benefit. There is no right *created*, but a right acknowledged as existing either
in

in the author, or transferred to the bookseller, *before the making of the act*, is confirmed by inflicting *certain* penalties on the invader*.

This

* The writer of the Enquiry asks, "If this be a natural right, to what purpose was the act of parliament made by which the property of each copy was established for a term of years? All affirmatory acts," he concludes, "strengthen and extend the common law; whereas this establishes for a time a right, which, if natural, must have existed at all times."

But this interpretation of the act is clearly erroneous. It hath been shewn above, that the act establisheth no right, but takes up a right already established, which it guards by additional penalties. It is the *penalty*, not the *right*, which is established for a time: and there was good sense in this provision. For at common-law, a jury must be under difficulty in estimating damages for the invasion of an author's property; which, from the nature of the wrong, are not easily ascertained. Therefore, in aid of this right at common law, the act provideth, that "every book exposed to sale without consent of the proprietor obtained in writing, shall be forfeited and made waste paper of: and farther, that the offenders shall forfeit one penny for every sheet in his custody, or exposed to sale." Every one knows, that it is a usual practice to strengthen a remedy at common law by the additional sanction of a statute; and the reason why this additional sanction is restrained to a number of years, is well accounted for by

This being the state of literary property, as it is founded both on the principles of natural reason and of law, let us, in the next place, view it in the point of convenience and inconvenience, and examine whether an exclusive right is likely to be favourable or prejudicial to the cause of literature.

In the discussion of this point, the writer of the Enquiry observeth, that “ in *England*,
“ the revival of letters was coeval with the
“ introduction of printing, and that authors

by the author of the letter above-quoted. “ The
“ great temptation,” he observes, “ to invade this pro-
“ perty being while the demand for it is great and fre-
“ quent, which is generally on the first publication of
“ a book, and some few years afterwards.” They
who applied for this act, had in view the author’s
immediate benefit only, and did not extend their
thoughts to futurity, from a presumption probably that,
after a certain term, the returns of profit being very slow,
there would be little temptation for piracy : therefore
the common law was thought sufficient to guard a right
so unlikely to be invaded. Grant the temptation to
have continued however, yet we too often find, that pe-
titioners to the legislature have not the generosity to
carry their concern beyond themselves and their imme-
diate connections, but are content to leave posterity to
guard their own rights.

“ had

“had but little encouragement, either by
“public or private liberality.”

In this, however, he seems to contradict the concurring evidence of history. It is certain, that at the revival of letters, authors met with extraordinary countenance and encouragement. Witness *Erasmus*, *Budæus*, and other learned men, who, in the resplendent state of literature, met with the most noble and generous reception from the great, and were even courted by contending princes.

At this time, the writer continues, “the custom first arose by which authors claimed the sole right of multiplying impressions of their books.” If we trace the progress of literature, however, we shall find that this claim arose much later, and that it derived its source from principles to which the writer has not adverted.

If I remember right, the art of printing was first introduced into this kingdom by the famous Caxton, towards the beginning

of the reign of Henry the VIIth*. Printers, at this time, were themselves men of erudition, and maintained a liberal and friendly correspondence with the learned. Their art, however, at first was rude, and perhaps was not used so much with a view to expedite the circulation of copies, as to relieve from the fatigue and expence of transcribing, and to give a more permanent character to the works of genius. If we reflect on the early state of literature, this will appear more than conjecture.

In the reign of Henry the VIIth, it was in its infancy. The press, at that time, was more employed in printing old copies, than in giving birth to new productions. The king himself, though a man of parts, was not distinguished by his love of literature. It is mentioned, as one of his accomplishments, that he understood Latin, though he generally read French. In few words, his atten-

* He was invited in the latter end of the reign of Henry VI. but, if recollection does not mislead me, he did not come till the time above-mentioned. However, strict chronological accuracy is not necessary on this occasion.

tion

tion was divided between his anxiety to establish his throne, and his endeavour to amass treasure: as to his munificence, it was confined to spies and informers.

In the succeeding reign, indeed, learning made a rapid progress. The king himself was an author. The great men of that age, encouraged and rewarded those talents which they cultivated themselves. Wolsey was a patron of literature; so was the great Sir Thomas More. Even the fair sex at this time made a figure in the learned circle: and there are now extant some well-penned letters, in the Latin tongue, from Sir Thomas More's daughter to Erasmus.

The learning of this period, however, was confined to ecclesiasticks, with a few persons of rank, who applied themselves to letters with that eagerness and assiduity generally bestowed on the attainment of a new accomplishment, which is becoming fashionable. As to the bulk of the people, they were so illiterate, that to be capable of reading merely, was a proof of no common education.

In the reign of Elizabeth, literature reaped a bounteous harvest. The reign of this learned princess produced the great Bacon, Raleigh, &c. Nor must we forget the learned Johnson; nor him, above all, whose lofty genius soared such towering heights, as no one since has been capable of attaining. In this reign, the English tongue received its first polish. Literature, however, still diffused itself by very slow degrees among the bulk of the people, and made little progress in the succeeding reign.

The learning of this reign was, for the most part, mere pedantry, and exhausted itself chiefly in polemical contraversion and scholastic subtleties, which contribute rather to perplex than to improve the understanding.

It was the reign of the unfortunate Charles, which contributed more than all those preceding, to enlighten the bulk of the people. During the miserable contentions of that period, appeals were made to the public from both parties: and whoever reads the speeches and remonstrances of those days, will find them penned with a native strength, precision and dignity of diction, free from those gallicisms

gallicisms which have contributed to enervate our language. About this time too, many admirable treatises were published on the art of government; which opening the eyes of the multitude, made them acquainted with their importance in the state, and at the same time rendered them anxious to improve the means, by which they acquired a knowledge so essential to their interest and freedom.

This happy tendency of literature was so obvious, that after the restoration, ungenerous endeavours were used to depress it. With this view the act was framed which has been quoted above, and which was calculated to subject works of genius in every kind to the tyranny of a licenser. But this was not all. The manners of the times contributed to the debasement of literature, as much as the restrictions of the legislature. *Scævior luxuria incubuit.* In a gay and voluptuous court, every thing serious and manly was perverted into an object of ridicule; and the wit of those days was downright ribaldry.

Real learning, from hence, remained some time at a stand, till it shone forth in its full

full lustre in the days of queen Anne. Then it was that the leading men in the administration were scholars and patronizers of learning. Then it was that a long catalogue of *Literati* reflected glory on the age they lived in. Then it was that the elegant Addison daily circulated his excellent essays, in the familiar channel of a news-paper.— A circumstance, which has contributed perhaps more than any other to diffuse a taste for literature among all orders of men.

The avidity of the public for the productions of the learned, and the encouragement afforded to authors, tempted every one who was illuminated with the faintest ray of genius, to turn his mind to literary pursuits. Hence the number of authors hath daily increased, in proportion as readers have multiplied.

The public, therefore, properly speaking, are now become the patrons of learning; authors are grown so numerous, that all cannot be taken under the especial patronage of the great.

From this deduction, we may clearly discover the reason why the author's exclusive right

right was never worth claiming before, nor indeed for some time after, the invention of printing. It was not, as the writer insists, "because it could never be executed before." For the right was always inherent, and might always have been executed: but we find that learning was, in its infant state, confined within a very narrow sphere. The author could have no dependance on the *number*, but on the *quality* of his readers. Nevertheless, we must not infer from the paucity of purchasers, what the writer supposes, that "the gains of the author were therefore small." The contrary is manifest. Men of learning in those days not only received liberal gratuities from the bounty of their patrons, but few of them were without *annual stipends*: therefore they were under no necessity of being anxious about the circulation of their copies.

But since authors and readers are multiplied, the case is extremely different. The profits of a copy are now collected by slow returns from a number of purchasers; and if the author has not a right in all the copies which are multiplied from his original manu-

manuscript, he has, truly speaking, scarce any property at all.

We cannot too much applaud the noble indignation which this writer expresseth against that base servitude in which he supposes authors to be dependant on booksellers, in consequence of the exclusive right contended for. But their servitude does not arise from this principle. Writers of real abilities need not be slaves to booksellers, unless the most profligate morals and habitual indiscretion conspire to make them drag such a galling chain. In this case they are not slaves as authors, but as men.

It is true, where a taste for reading is so universally diffused, there will be authors suitable to every class of readers. Many futile and obscene productions will be adapted to the prurience and depravity of the great and small vulgar. But writers of such low estimation are slaves by nature, and it is of no importance to the public who are their masters.

There is scarce a right which the law protecteth which is not liable to abuse. Its provisions

visions nevertheless must extend to generals, and cannot involve every specific object, which may furnish a ground for exception.

What a prejudice would the cause of literature sustain, were writers deprived of the exclusive right to their own productions, and of the privilege of transferring them? Should this determination ever take place, the public must never more expect works of great length and difficulty, the execution of which demand the united contribution of perhaps more than twenty opulent booksellers, who hazard a certain sum on the prospect of uncertain gain.

Where will patrons be found among the great, who will support an author in such expensive and hazardous undertakings? Grant that there are such. Yet how shall a writer, perhaps in the vale of obscurity, climb to the closet of the great? Were we even to suppose a writer himself to be in competent circumstances, a lot not common among the learned, yet few would choose to risk a large and certain expence, to be reimbursed by slow and uncertain returns of profit.

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Whoever, therefore, attentively considers the present state of literature, will find that booksellers are necessary intermediate instruments between the author and the public. Learning now is not so rare a quality as immediately to distinguish the owner, and attract the notice of the great. Unless a writer is happy in particular connections, the bookseller must present him to the public. If, however, he gives proofs of real talents, he cannot be kept in dependance, for it will be the interest of the bookseller to respect that merit, which redounds to the profit of himself as well as of the author.

When a writer hath once made his merit known to the public, he will not long remain a stranger to the great. Of whom, in general, it must be acknowledged that they are not so backward to patronize literature, as some unsuccessful candidates for favour have conspired to represent them. In truth, complaints of this nature generally proceed from such as are unworthy of notice, or who, in the pride of parts, over-rate their merit.

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But if an author cannot maintain an exclusive right to his copy, the powers of genius must languish, and few will have an opportunity of producing those excellent talents with which nature hath enriched them. Scarce any productions will issue from the press, but hasty fugitive pieces, calculated to serve the run of the day, and which will excite as little temptation, as they afford opportunity, for piracy.

It were to be wished indeed that authors could receive the whole profits, or sustain the whole loss, arising from the publication of their works; and that booksellers were, what the word importeth, mere venders of copies. But this, however natural and reasonable in speculation, cannot, for the reasons above assigned, be reduced to practice. Few authors, as hath been said, can advance money for a work of any expence, and wait their reimbursement by slow returns. Neither have they, as formerly, the means of procuring the patronage of the great, but must approach them through the channel of the public. Therefore if they have not an exclusive property in their works, and

consequently a power of transferring such right, learning will soon be lost among us, the gloom of Gothic ignorance will darken the age, and extinguish every beam of science.

Having endeavoured to shew that a literary copy is a subject susceptible of property, that it may be governed by the known and established rules of law, that the exclusive right contended for will produce no inconvenience, either with regard to the author or to the public, that on the contrary a communion of this right will be injurious to both, and in the end destructive of literature, it remains to hope that this right may be judicially established, and preserved inviolably to the latest posterity.

May the fruits of genius never be exposed to rapine and depredation ! May they, who are too often destitute of the goods of fortune, be secured in the enjoyment of the goods of the mind, which they derive from the bounty of nature ! May it never be said that the *Common Law* of England so renowned for the wisdom and impartiality of its institutions, affordeth no protection to the
product

product of learning, which is the parent of every social refinement, the friend of virtue, and the guardian of civil liberty. "Pleni," says Tully, "omnes sunt libri, plenæ sapientium voces, plena exemplorum vetustas; quæ jacerent in tenebris omnia, nisi literarum lumen accederet. Quam multis nobis imagines, non solum ad intuitum, verum etiam ad imitandum, fortissimorum virorum, expressas, scriptores reliquerunt? Quas ego mihi semper in administranda republica proponens, animum, & mentem meam ipsa cogitatione hominum excellentium, conformabam."

F I N I S.

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 " istorum virtutum, expositis scriptores re-
 " puerunt? Quis ego mihi temper in ad-
 " ministranda republica propere animam
 " & mentis meam ipsa cogitatione homi-
 " num excellens conturbam?"

